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blood-stains, on muslin and linen cloth, after at least a year's exposure, with entire success, and inquired of Prof. Wormley whether he had ever detected any difference in the size of blood corpuscles soaked out from stains on linen, wood, &c., and those from spots on paper or glass.

"Prof. Wormley replied that he had not found any variation in corpuscles from blood-stains dried on a great variety of objects, and kinds of fabrics."

Dr. Richardson says, in *London Microscopical Journal* for Sept. 1874: "The experience of Prof. Leidy and Prof. Wormley accords with mine, in that they have never seen the drying or remoistening of red blood corpuscles cause them to expand. From this it would seem to follow, that the expression, 'restore the corpuscles,' is used incorrectly, as there can be no restoration other than the bringing of them back to their normal size. This, also, goes to prove what I have said before on this point."

As it regards the unchangeableness of blood corpuscles through lapse of time, Dr. Richardson says in this same paper, that blood spots, which he had examined five years previous, gave corpuscles unchanged in size.

R. U. PIPER.

Chicago, June 1880.

(To be continued.)

RECENT ENGLISH DECISIONS.

Court of Appeal (from Exchequer Division).

LEIGH v. JACK.

The plaintiff's testator conveyed to the defendant, or his predecessors in title, two pieces of land adjoining a strip of land intended by the testator for a highway. For more than twenty years before action, the defendant made some use of the strip of land for business purposes. Within twenty years, both the plaintiff or the plaintiff's testator and the defendant had repaired some railings separating the strip of land from an adjoining highway, and within twenty years the defendant had first enclosed a portion and afterwards fenced it in at either end. In an action to recover possession of the strip of land, *held* (affirming the decision of the Exchequer Division), that the presumption that the soil to the middle of a highway belongs to the owner of the adjoining land, does not arise where such land adjoins an intended highway never dedicated to the public. *Held, also*, that the plaintiff had not been dispossessed by the defendant, nor had the plaintiff discontinued possession within section 3 of the Statute of Limitations.

APPEAL from the Exchequer Division on a special case stated by an arbitrator in an action for recovery of land. The following are the material parts of the special case :

The action was brought to recover possession of a piece of land situate in Kirkdale, in the borough of Liverpool. Part of the piece of land was described as Grundy street and the residue as Napier place. The piece of land, together with land adjoining thereto on the north and south, was in the occupation of the defendant. The plaintiff was tenant for life under the will of John Gerrard Leigh, deceased, of all the lands of which one John Shaw Leigh died seised.

In 1854, John Shaw Leigh being seised in fee of a piece of land marked B 1854 on the plan annexed to the special case, as well as of the piece of land in respect of which this action was brought, and of other land adjoining and now in the occupation of the defendant, by deed dated the 1st of December 1854, conveyed to the defendant the piece of land marked B 1854 in fee, subject to a ground-rent secured by powers of distress and re-entry. The piece of land conveyed by the deed was thus described therein :

“All that piece of land situate, lying and being in the township of Kirkdale, within the borough of Liverpool, in the county of Lancaster, and on the east side of Regent road, south side of Grundy street and west side of Napier place, in the Victoria road in Liverpool aforesaid, bounded on the north by Grundy street, on the east by Napier place, on the south in part by land formerly of the said John Shaw Leigh, but now belonging to the Lancashire and Yorkshire Railway Company, and in the remaining part by land lately conveyed by the said John Shaw Leigh to the said James Jack, on which the said James Jack hath erected an iron foundry and other buildings, and on the west by Regent road aforesaid, and which said piece of land intended to be hereby granted * * * contains in the whole 4259 square yards of land * * * .”

The 4259 square yards were the total contents of the land south of Grundy street, and did not include any portion of the site of that street.

On the 19th of March 1857, John Shaw Leigh by deed conveyed to the Mersey Dock Trustees, the piece of land marked C 1872, lying to the north of the piece of land called Grundy street. The total contents did not include any portion of the site of Grundy street. On the 13th of March 1872, the last-mentioned piece of

land was by deed conveyed by the Mersey Dock Trustees to the defendant.

Grundy street and Napier place were names used to describe certain portions of waste land belonging to John Shaw Leigh, and which he had at one time contemplated dedicating to the public as streets, and they were marked as streets on a plan of that portion of the Leigh Estates, which John Shaw Leigh caused to be prepared and hung up in the Leigh estate office, with a view to the sale or lease of portions of the estate for building.

Grundy street and Napier place were never in fact used by the public as highways. Save as hereinbefore is stated, John Shaw Leigh never dedicated Grundy street or Napier place to the public. Up to the time of the enclosing of Grundy street by the defendant, hereinafter mentioned, Grundy street was separated from Regent road by a fence consisting of posts and a swing rail. This fence was repaired and renewed both by John Shaw Leigh and by the defendant within the twenty years next before this action and after the purchase by the Dock Board.

Immediately after the conveyance to the defendant of the piece of land marked B 1854, the defendant caused a rough post and rail fence to be put along the northern boundary of Grundy street, for the purpose of defining the boundary.

Immediately after the conveyance in 1857 to the Dock Board Trustees of the piece of land marked C 1872, such trustees caused a substantial post and rail fence to be erected along the northern boundary of Grundy street.

In 1854, on taking the conveyance of that date of the piece of land marked B 1854, the defendant erected a foundry and iron-works along the northern boundary of Grundy street, with windows looking out into that street and Napier place, and a gateway leading into Napier place. From the time of taking the conveyance down to the date of the enclosure of Grundy street and Napier place, hereinafter mentioned, the defendant, by placing a quantity of old graving dock materials, screw propellers, and boilers, and refuse from his foundry over the surface of Grundy street and Napier place, rendered them impassable for carts and horses. Persons on foot, however, did occasionally, down to that date, pass along Grundy street from Victoria road to Regent road.

In 1865, the defendant enclosed an oblong piece of Grundy street.

In 1872, the defendant completely enclosed the pieces of land called Grundy street and Napier place, on the west and east sides respectively.

No complaint was made on behalf of the Leigh family with respect to any of the said acts of the defendant until 1875.

This action was commenced the 1st of April 1876.

The arbitrator, if and so far as it was a question of fact, found that the defendant did not acquire a title by possession and user only to any portion of the land.

The Exchequer Division gave judgment for the plaintiff. The defendant appealed.

C. Russell, Q. C., and *W. Butler*, for the defendant.—By virtue of the conveyances, the soil of Grundy street, *usque ad medium filum viæ*, is vested in the defendant. That presumption applies, for the plaintiff has not rebutted it, and he did not reserve to himself the property in the soil of the road: *Simpson v. Dendy*, 8 C. B. N. S. 433; *Berridge v. Ward*, 10 Id. 400; *Holmes v. Bellingham*, 7 Id. 329. This case is to be distinguished from *The Plumstead Board of Works v. The British Land Company*, Law Rep. 10 Q. B. 16, for there the conveyances showed an intention to exclude the soil of the road from passing. See also *The Marquis of Salisbury v. The Great Northern Railway Company*, 5 C. B. N. S. 174. Even if the soil of Grundy street has not vested in the defendant by virtue of the conveyances, he has acquired a title by possession for more than twenty years next before action, and the plaintiff, therefore, is barred by the Statute of Limitations, as he has been dispossessed or has discontinued possession for that period of time.

Herschell, Q. C., *Gully*, Q. C., and *A. L. Smith*, for the plaintiff, were stopped by the court.

COCKBURN, C. J.—I am of opinion this judgment must be affirmed; for, looking at the conveyances by which the property in question has passed, I think the presumption of law does not arise in this case. The presumption is that in the case of a highway, the ownership of the soil, *ad medium filum viæ*, is in the adjoining landowners, and it is founded on the assumption that in making a road for public convenience, a sacrifice was made by the adjoining owners of a portion of their land for public purposes. It

is a presumption of law founded on reasonable probability, and is a very useful rule where it is uncertain in whom the ownership of the soil is vested. But I think the presumption does not arise where, as on this case, we have a modern grant or conveyance which speaks for itself, for then there is no difficulty as to the ownership of the soil of the road. There is, therefore, no reason for making the presumption in this case, and I do not think the grantor intended to divest himself of the soil of that piece of land, which was then waste land.

The defendant, however, relies also on the Statute of Limitations. It is argued that the plaintiff and her predecessors have been dispossessed of the profits of this land for twenty years, and therefore the plaintiff's claim is barred. It is not alleged that the plaintiff has been dispossessed by anything, unless it be by the acts of the defendant. That was a question of fact for the arbitrator; he decided that they did not amount to dispossession of the plaintiff, and I think his finding was quite right. Nor did the plaintiff discontinue possession. It was the intention of the owner of the land to make a street, and to dedicate part of this land to the public, and the acts done by the defendant were not done to defeat that intention. The acts of the defendant were simply the acts of a man who did not intend to be a trespasser, and who used the land meanwhile for his own purposes, until the owner should put it to the use contemplated by both parties. I apprehend a person does not necessarily discontinue possession of land because he does not actually use it himself or by his agent. I am of opinion, therefore, that there has been in this case no dispossession or discontinuance of possession, and therefore our judgment should be for the plaintiff, and the appeal dismissed.

BRAMWELL, L. J.—I am of the same opinion. The first question for us to consider is, what passed by these conveyances? To ascertain the intention of a document, it is necessary to look at the surrounding facts. The rule is, that if I convey an estate which is bounded by roads, then that grant would pass these roads *usque ad medium filum viæ*.

Now let us take this case. When these conveyances were executed there was no street in existence, and I see no reason for supposing that the grantor intended to convey half of the soil over which he contemplated making a street. Surely he might make

the street wider or narrower than at the time of the grant he proposed to do; but if the property in the soil passed by this grant, then the grantor could have been prevented by the grantee from making the road, and he would not have been able to dedicate it to the public at all. I do not think this can be the case; and I think the grant to the defendant did not include the land *ad medium filum viæ*. I have had a misgiving as to the northern half of the intended street; but I think the reason of the thing is to hold that the presumption of law already referred to does not apply, and that the property granted is described by metes and bounds. If in both conveyances the words had been "intended street," could it have been said that the plaintiff intended to grant away the soil, and that he could be prevented from making the street? I think not; and I am of opinion that the Dock Trustees and the defendant did not get the soil *ad medium filum viæ* of the land in question.

As to the Statute of Limitations, I think the statute contemplated two cases. First, where a man has been dispossessed by a tortious act. Second, where he has discontinued possession. It is difficult to suppose a case of complete discontinuance of possession of a house, for a very little would be sufficient to show continuance of possession. But there are conceivable cases of discontinuance, as, for instance, in the case of a definite field, an outlying piece of land: a man might keep out of it and do nothing to it for twenty years, and so discontinue possession. The plaintiff might have done so here; he might never have repaired the fence, never have offered to let, nor gone near the place by himself or any agent; then, I think, he would have discontinued possession; but it is a question of fact, and difficult to establish against an owner of land. The arbitrator seems to me to have said that if it was a question of fact for him, then he found the plaintiff had not discontinued possession. The arbitrator found no dispossession and no discontinuance. I do not think he is wrong; it is necessary that the defendant should show dispossession or discontinuance of possession; acts of trespass by the defendant are not enough. However, it is stated in evidence that the plaintiff repaired a fence within twenty years, and that is sufficient to show that he has not discontinued possession. The arbitrator has found the defendant has not so dealt with the land as practically to evict the plaintiff; there has, therefore, been no dispossession. I think that the plaintiff is entitled to our judgment.

COTTON, L. J.—As neither of the two conveyances purports in terms to convey the land in question to the defendant, he is compelled to rely on a presumption of law to pass the soil of Grundy street. Where there has been a conveyance of property adjoining a highway, then the presumption, *usque ad medium filum vie*, arises, for the presumption applies to roads existing at the time. But no case has been shown in which a conveyance of land adjoining something which it is intended to make into a road at some future time, has been held to pass the right to have the soil of that road when it shall be made. The question, therefore, is, whether or no the presumption arises with reference to a road intended to be a highway. In such a case the owner still retains over the land his rights, which have not been diminished in any way by any public rights acquired through the land being dedicated to the public. The presumption is of law only, and can be rebutted; and in such a case as the present many circumstances must exist to establish the presumption. I am of opinion that it does not arise where there is only an intention to dedicate a street to the public, and there is no existing highway. I do not think the case of the land which passed by the second conveyance is really different. I am of opinion the presumption could not arise in respect of that land, and I decide the case on the ground that there was no existing highway at the time of the conveyance.

As to the Statute of Limitations, we have the finding of the arbitrator that the plaintiff was not dispossessed, and I am unable to discover any facts amounting to dispossession of the plaintiff by the acts of the defendant. Nor do I think the plaintiff has discontinued possession. It is not necessary that an owner should actually be in possession in person: though absent, he may still be in possession in the eye of the law. We must look at the nature and condition of the property. If that is done here, the conclusion come to is, that the acts of the defendant did not oust the plaintiff, and that the plaintiff has not himself discontinued possession. Therefore the defendant fails on both points.

Judgment affirmed.

In America, also, it is familiar law, that a deed of land, bounded "on," "upon," "by" or "along" an existing public highway, *prima facie* conveys the fee to the middle of the road. The rule is too well settled to need the citation of

authorities, it being of course limited to cases where the grantor owns the fee of the road and has a right to convey it: *Dunham v. Williams*, 36 N. Y. 251.

And this rule applies to deeds of city lots as well as to country farms: *Ham-*

mond v. McLachlan, 1 Sandf. 323; *Bissell v. New York Central Railroad Co.*, 23 N. Y. 61. And although the way be so ancient that its origin is unknown: *Rice v. Worcester*, 11 Gray 283, note.

It applies to deeds bounded on a railroad, the fee of the bed of which is in the grantor; *Maynard v. Weeks*, 41 Vt. 617. And some think it applies to land bounded "on a park." See *Perrin v. New York Central Railroad Co.*, 36 N. Y. 120. *Sed quære*.

The general rule also applies to deeds bounding on a *private* way, lane or alley, the half of which belongs to the grantor: *Fisher v. Smith*, 9 Gray 441; *Simpson v. Dendy*, 8 C. B. (N. S.) 433; *Holmes v. Bellingham*, 7 Id. 329.

And by the "centre of the road," in such a case, is ordinarily meant the centre of the *travelled* path or actual road, and not merely the centre of the located or legal way, if they differ; so that in some cases, where the travelled path is at one side of the located road, the grantor might retain more or less than one-half of the legal road. This rule is thought to be more reasonable, since the question always being one of implied intention, it is considered more probable that the parties had reference to a visible, apparent, existing road *de facto*, rather than to an invisible, recorded line, or boundary not indicated or apparent by fences, monuments or the like.

And this is the more obvious where the travelled and actual way is *wholly* outside of the limits of the legally located and recorded way. See *Sproul v. Foye*, 55 Me. 162; *Falls Village Water Power Co. v. Tibbetts*, 31 Conn. 165; *Tebbetts v. Estes*, 52 Me. 566. And see *Stearns v. Rice*, 14 Pick. 411.

This presumption or rule of law, however, is generally acknowledged to be *prima facie* only, and it may be controlled by the use of sufficient language in the deed, clearly showing it was not the intention of the grantor to convey

any portion of the highway, such as "by the side of the highway, &c.:" *Tyler v. Hammond*, 11 Pick. 193; *Jackson v. Hathaway*, 15 Johns. 447; *Sibley v. Holden*, 10 Pick. 249; *Smith v. Slocumb*, 11 Gray 280; *Sizer v. Devereux*, 16 Barb. 160; *Hughes v. Providence & Worcester Railroad Co.*, 2 R. I. 508; *Hoboken Land & Improvement Co. v. Kerri-gan*, 2 Vroom 13; *Brainard v. Boston & N. Y. Central Railroad Co.*, 12 Gray 407; *Buck v. Squires*, 22 Vt. 484; *Cottle v. Young*, 59 Me. 105; *Marquis of Salisbury v. Great Northern Railway Co.*, 5 C. B. (N. S.) 174; *Plumpstead Board of Works v. British Land Co.*, Law. Rep., 10 Q. B. 16.

Not unlikely some conflict may be found in the adjudicated cases in the application of these rules; but all agree that the question is one of construction in each particular case, depending upon the intention of the parties, as expressed in the descriptive parts of the deed, explained and illustrated by all the other parts of the conveyance, and by the localities to which it applies. See *Codman v. Evans*, 1 Allen 446; *Boston v. Richardson*, 13 Allen 153.

Perhaps all agree, too, that in cases of doubtful construction, the general rule is followed, viz., to the centre of the street: *Marsh v. Burt*, 34 Vt. 289; *Maynard v. Weeks*, 41 Vt. 619.

In *White v. Godfrey*, 97 Mass. 472, the rule was applied to a deed containing this description: "A certain tract of land on the *northerly side* of S. street, beginning at a point on the line of B.'s land; thence by said street, N. 58° W., about one hundred feet to a stake and stones at the corner of G.'s land," although the stake and stones were not in the centre of the highway, but at the side of it. See also *Cole v. Haynes*, 22 Vt. 589; *Paul v. Curver*, 24 Penn. St. 210; *Adams v. Saratoga and Washington Railroad Co.*, 11 Barb. 414; *Johnson v. Anderson*, 18 Me. 76.

The fact that the full length of the side

lines stated in the deed, or the whole quantity there mentioned can be obtained without including any part of the highway, will not alone exclude the highway from the deed: see *Newhall v. Ireson*, 8 Cush. 595.

In *Berridge v. Ward*, 10 C. B. (N. S.) 400, the general rule was applied, although the deed referred to a plan, on which the lot conveyed was colored red, the roadway was uncolored, and although the quantity mentioned in the deed did not require any part of the road to fulfil it.

So the general rule has been held to apply, although the deed also *expressly* grants a free use of the road or passage-way to the grantee, to be used in common with the grantor and his heirs. Such language may possibly be necessary in order to give the grantee a right to use the *whole* way as a passage, but does not necessarily show the grantor did not intend to also convey a fee in half of the way: see *Stark v. Coffin*, 105 Mass. 330; *Motley v. Sargent*, 119 Id. 231.

As to the exact point considered in the principal case, but few adjudged cases involve it. On the one hand it has been held that where land is conveyed as bounded on a street, which exists only

by designation on a plan, and not yet made, the soil of the street, though belonging to the grantor, does not pass, but only a right of way over it: *Palmer v. Dougherty*, 33 Me. 502; *Bungor House v. Brown*, Id. 309; *Southerland v. Jackson*, 30 Me. 462. But see *Bissell v. New York Central Railroad Co.*, 23 N. Y. 61.

A somewhat similar decision was made in *Brainard v. Boston & New York Central Railroad Co.*, 12 Gray 407, in which it was declared that a deed of land bounded on a passage-way, which has never been used as a public or private way, by the grantor or any person, conveys neither the fee nor any right of way in such passage-way. Whereas in *Stark v. Coffin*, 105 Mass. 328, it was decided that a deed bounded "by a passage-way of fifteen feet wide," leading from a public road to the land, conveyed to the centre of such fifteen feet, although no such way then existed, or had ever been fenced off, but on the contrary the land conveyed and the adjoining land always remained open, without division or separation from each other, and with a front fence along the line of both and across the so-called passage-way.

EDMUND H. BENNETT.

RECENT AMERICAN DECISIONS.

Supreme Court of Michigan.

DEWEY v. UNION SCHOOL DISTRICT OF THE CITY OF ALPENA.

The act of God that will excuse the performance of a contract must be one rendering performance impossible. If it merely makes it difficult or undesirable, it is not sufficient. Thus, where schools were suspended on account of the prevalence of small-pox, the teacher remaining ready to perform his contract, he was not, by reason of such suspension, precluded from his right to compensation during such period.

ERROR to Alpena.

Holmes & Carpenter, for plaintiff in error.

Turnbull & McDonald, for defendant in error.